***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S BRIEF

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and proof of service

75-1261

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To be argued by
JESSE BERMAN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

Appellee, :

-against- :

RAUL ESTREMERA, : Docket No. 75-1261

Appellant. :

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BRIEF FOR APPELLANT

APPEAL FROM A JUDGMENT OF CONVICTION RENDERED IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

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## ISSUES PRESENTED

1. Whether appellant was denied a speedy trial under the local rules by the government's failure to make any effort to obtain his presence for trial during a nine month period when it knew he was detained by Canadian authorities.

2. Whether prosecutorial misconduct, designed to either effect a guilty verdict or to induce a mistrial, which would afford the prosecution an opportunity at a second trial to improve its case, deprived appellant of his Fifth and Sixth Amendment rights to single jeopardy, due process of law and fair trial.

3. Whether the refusal to permit appellant to appear in a line-up was, under the particular curcumstances of this case, an abuse of discretion and a denial of appellant's constitutional rights to a fair trial, to confront the evdience against him, and to equal protection of the law.

4. Whether the jury's view of the metal detectors and of appellant in the custody of the marshals, deprived appellant of the presumption of innocence and denied him a fair trial.

5. Whether the Court-ordered pre-trial discovery of the defense photographs of Alberto Estremera was not authorized under Rule 16(c) and improperly served to inform the prosecution of exactly what appellant's defense was going to be.

6. Whether the Court's refusal to grant C.J.A. appointment to appellant's counsel, who was uniquely familiar with appellant and with this case, and who would face considerable expense for travel to verify the Utah alibi and for an investigator to show photos to the eyewitnesses, was an abuse of discretion and denied appellant of the effective assistance of counsel and equal protection of the law.

7. Whether the Court, in ignoring the differences between appellant and his co-defendants, the recommenations of the pre-sentence report and the individual positive and mitigating factors in appellant's history and character, and in considering only the fact of the bank robbery in imposing virtually identical sentences on all three defendants, employed a fixed and mechanical approach to sentencing, requiring this Court to invalidate appellant's sentence.

## STATEMENT PURSUANT TO RULE 28(a)(3)

### A. Preliminary Statement

This appeal is from a judgment of the United States District Court for the Southern District of New York (Duffy, J.), rendered June 24, 1975, convicting appellant after trial by jury of the crimes of bank robbery, bank larceny and armed bank robbery (18 U.S.C. §2113(a), (b) and (d)), and sentencing him to seventeen (17) years imprisonment.

Timely notice of appeal was filed and this Court, on July 10, 1975, appointed Jesse Berman, Esq., as counsel on appeal, pursuant to the Criminal Justice Act.

Appellant is presently in the Federal Penitentiary in Atlanta, Georgia, serving the sentence pursuant to the judgment herein.

### B. Statement of Facts

On February 9, 1973, four men robbed a branch of the First National City Bank at 505 Southern Boulevard in the Bronx. From the bank surveillance photos, it is apparent that three of the robbers were black, and that the fourth man, who was of Latin appearance, was dressed in coveralls and a construction helmet.

Now that we have received the

1) The Arrest of Alberto Estremera

It was undisputed that a getaway car used in the robbery was a 1969 red Ford van, registered to Alberto Estremera, appellant's brother (T.189;293).*

On February 15, 1973, less than a week after the robbery, Alberto Estremera and Oscar Lee Washington were arrested and charged with the instant bank robbery. Washington was arrested inside Alberto Estremera's van (the getaway vehicle), which was at the time parked in front of 354 Saratoga Avenue, Brooklyn, the building in which Alberto Estremera lived (T.194).

As a result of Washington's arrest, the police and the FBI, without any warrant, searched apartment No. 7 at 354 Saratoga Avenue and found "a large quantity of United States currency" and fourteen weapons (TH. 91-93;** Court's Exhibit 8 at the Taint Hearing). Based on what it had found at apartment No.7, the FBI quickly obtained search warrants for apartment Nos. 11 and 14 at 354 Saratoga Avenue, where they then found more weapons and contraband, and where they then also arrested Alberto Estremera (TH. 91-93; T.292). When

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*/ "T" refers to minutes of trial, May 19, 20, 21, 22, and 23, 1975.

**/ "TH" refers to minutes of the pre-trial taint hearing, May 12-13, 1975.

the legality of those searches and seizures was challenged, the government agreed not to use any of the fruits of those searches (TH.92-93), and indeed, on February 26, 1973, the government consented to the dismissal of its case against Alberto Estremera, who was then represented by Jesse Berman, the same attorney who represented appellant at the trial herein.

2) The Indictment

Subsequently, appellant Raul Estremera was indicted for the instant bank robbery, together with Oscar Lee Washington, Pedro Mario Monges and Victor Cumberbatch.

At appellant's trial, the government claimed that Washington, Monges and Cumberbatch were the three black robbers and that appellant was the Latin robber in the coveralls and helmet. Appellant denied participation in the robbery and introduced documentary proof tending to establish that he was in Utah at the time of the robbery. Appellant's counsel offered proof that two of the three bank-employee eyewitnesses had, prior to trial, identified Alberto Estremera, from photographs, as the 'robber in the helmet,' and appellant's counsel argued that it was Alberto, not Raul Estremera, who robbed the bank and who appeared in the bank surveillance photos (See discussion, infra).

Washington and Monges pleaded guilty and

were each sentenced to eighteen (18) years imprisonment. Neither of them testifed at appellant's trial. Cumberbatch has never been tried.*

3) The Speedy Trial/Extradition Issue

Prior to trial, appellant moved for dismissal of the indictment based on the government's denial of his right to a speedy trial.

When the instant prosecution was initiated against appellant, in February, 1973, appellant's whereabouts were not known to the government and a bench warrant was issued. However, on January 28, 1974, appellant was arrested by Canadian authorities in Montreal, Quebec, and two days later, on January 30, 1974, FBI Agent Milton Ahlerich, the case agent in charge of this case, was informed of appellant's whereabouts in the Montreal jail.**

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*/ Cumberbatch has been represented by Robert Bloom, Esq., in connection with this bank robbery and on other matters. On October 1, 1975, Judge Duffy appointed Mr. Bloom pursuant to the Criminal Justice Act as counsel for Cumberbatch on this case.

**/ See affidavit in support of motion to dismiss for want of speedy trial, dated March 14, 1975, paragraphs 5 and 6.

On January 30, 1974, FBI Agent Edward McShane, who was stationed in Plattsburgh, New York, and who had informed Agent Ahlerich of appellant's arrest, decided not to commence any extradition proceedings against appellant, but instead chose to wait for Canada to deport appellant.*

This decision, as to which legal course to pursue, was apparently made by McShane, the FBI agent on the scene, who believed it was likely that appellant would be deported because (among other reasons) appellant had a criminal record.**

The government, that is the United States Attorney for the Southern District of New York, acquiesced in McShane's learned legal judgment on this matter.

Appellant, at that time, had only one criminal conviction, and that was for "mischief," a misdemeanor, in Brooklyn Criminal Court.***

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*/ See affidavit in opposition to speedy trial motion, filed April 11, 1975, paragraphs 5, 6, 7, and 8.

**/ See affidavit in opposition, supra, paragraph 7.

*** / Any prosecutor admitted to practice in New York should know that a defendant cannot be convicted of anything higher than a misdemeanor in Criminal Court.

The FBI supplied the Canadian Immigration Court with appellant's 'record,' and that Court mistakenly understood the mischief conviction to be a felony and ordered appellant to be deported.*

Appellant immediately appealed to the Federal Court of Appeals in Canada, where the error was corrected, and, on October 30, 1974, that Court ordered the deportation proceedings against appellant dismissed, holding that because appellant's only conviction had been a misdemeanor, he could not be deported as an undesirable alien.**

The government has conceded that its failure to attempt to promptly seek appellant's extradition, and its mistaken, passive reliance instead on deportation by Canada, was the government's "fault" and "its erroreous reading of Canadian law" (Govt's Memorandum in Opposition, filed April 11, 1975, p.7).

On October 31, 1974, nine (9) full months after it had learned of the fact of appellant's detention in Canada, the government made its first attempt to obtain his presence for trial on the instant case. On that date,

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*/ The record herein is silent on the question of whether the FBI or some other agency of the government misrepresented or mischaracterized the mischief as a felony to the Canadian court, and Judge Duffy denied appellant's speedy trial motion without any factual hearing, without any argument and without any opinion.

**/ See affidavit in opposition, supra, paragraphs 9 and 10.

Paul Curran sent a telegram to the Canadian police, informally asking them to hold appellant until extradition demand papers could be prepared.* The extradition papers were finally sent to Canada in November, 1974, and appellant was extradited in January, 1975.

The government never filed a notice of readiness in the instant case with regard to appellant, and, in his motion to dismiss, appellant argued that the government had not sustained its burden of proving that the nine-month period of delay from January 30, 1974, to October 31, 1974, should be tolled because of any of the exceptions under Rule 5 of the Southern District Prompt Disposition ("Speedy Trial") Rules.** The motion was denied without any hearing or opinion.

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*/ See defense affidavit, supra, paragraph 7 and the government affidavit, supra, paragraph 11.
It is interesting to note that the action of the Canadian police in detaining appellant, without any warrant or commitment or other legal process, from the time he won his Canadian appeal until the United States goverment got around to preparing formal extradition papers, was clearly improper, but has no direct bearing on this speedy trial point.

**/ Both sides agreed that Rule 5(f) was the only exception which the government could try to argue, and the government found no cases in this Circuit construing that rule. See memorandum in Opposition, supra, p.7.

4) The Refusal to Appoint Appellant's Counsel under the CJA

A review of the entire record below, especially the pre-trial proceedings, clearly shows that appellant's counsel and the trial judge were not particularly fond of each other. This atmosphere of mutual dislike apparently began at a pre-trial conference when counsel criticized the Court for apparently pre-judging the question of whether appellant was one of the bank robbers:

> THE COURT: [The prior prosecutor] sug-suggested that the case was going to be, I think his words were, 'Saturday night at the movies.'
>
> It appears that a number of motion pictures were taken as the defendants in this situation were attempting to rob the bank.
>
> * * *
>
> MR. BERMAN: ... I would ask the Court to recuse itself from consideration of this case as to Mr. Estremera for the following reason: ... the Court just referred to [the bank surveillance photos] as being pictures of the defendant. The defendants, at least those two [who have] not [pleaded] guilty, are clothed in the presumption of innocence. These [photos] might well be [of] perpetrators, indeed they might turn out to be [of the] defendants. If the Court is of the opinion that these are pictures of the defendant standing on trial, I think it would be the better part of wisdom and justice to assign this matter to another judge.
>
> * * *

THE COURT: ... I was not making a ruling that the pictures were of your particular client. Under the circumstances I will not recuse myself in the case.

(Minutes of February 19, 1975, pp. 2-3; 4-5, emphasis added)

* * *

THE COURT: [Appellant has moved for] disclosure under Brady [of] eyewitnesses identifying somebody other than the defendant? ...

In other words, if there was some kind of misidentification by an eyewitness of somebody, is that what you want?

MR. BERMAN: I wouldn't call that a misidentification. I don't prejudge the case.

THE COURT: I am not prejudging it.

(Id., pp.12-13)

On March 3, 1975, appellant's counsel moved, in writing, to be appointed pursuant to the Criminal Justice Act:

I have represented the defendant since he first contacted me on January 11, 1975. Prior to that, I represented his brother, Alberto, on this same case [The case against Alberto was dismissed]. I am totally and indeed uniquely familiar with this case. I have the trust of the defendant and his family. I have previously represented the defendant on Indictment 72 Cr. 1291 (E.D.N.Y.), where I was appointed by Judge Weinstein, pursuant to the Criminal Justice Act. I am a member of the Southern District 's panel of attorneys under the Criminal Justice Act. I have tried five bank robbery cases in the Southern District in the past two years. I have not

> received any compensation in any form from the defendant or from anyone else in connection with this case, and this Court has found that the defendant is indigent within the meaning of the Criminal Justice Act. Under the circumstances set forth above, I respectfully request this Court to appoint me to represent the defendant in this case pursuant to the Criminal Justice Act.
>
> (Affidavit in support of motion, filed, March 4, 1975, paragraph 8)

On March 10, 1975. the Court indicated its intention to deny the motion. In the course of colloquy, the Court noted that:

> ... it is not very difficult to make more than a federal judge makes and the first year that we had the CJA we discovered that there were a number of attorneys appointed so often that they made substantially more than we did.
>
> (Minutes of March 10, 1975, p.15) *

The Court indicated that it adhered to a rigid personal rule of not appointing anybody "except on a rotating basis," ** although the Court acknowledged

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*/ Appellant's counsel was a college undergraduate during 'the first year we had the CJA,' and was not then engaged in the practice of law. Nor was Judge Duffy on the bench at that time.

**/ Judge Duffy apparently broke this unbreakable rule when, on October 1, 1975, he appointed Robert Bloom, Esq., pursuant to the CJA, not in the normal rotation, to represent the co-defendant Cumberbatch in this case. Mr. Bloom had previously represented Cumberbatch in other, state-court cases, much as Mr. Berman had previously represented both appellant in another federal case and appellant's brother in this case.

that this personal rule "has not become the rule in this district by any means and that [it rather] is this particular Court's individual preference" (Minutes of March 10, 1975, p.16).

Appellant's counsel stated that:

> I have no intention of withdrawing from the case and if I were to withdraw from this case I think it would really be to Mr. Estremera's detriment at this point, and I will take this case pro bono and do the best I can on it whether or not I am reimbursed by the Government in this case.
>
> (Id., at p.16)*

The Court reserved decision on the motion (id., p.18), and did not deny the motion until commencement of the Simmons suppression hearing (Minutes of March 21, 1975, p.3).**

At trial, appellant attempted to establish as an alibi the fact that he had been in Clearfield, Utah, at the time of the bank robbery (T.326; Exh. K-3). However,

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*/ Two months later, immediately prior to trial, the Court refferred to Mr. Berman as "retained counsel in this case ... retained by the family of the defendant" (Minutes of May 9, 1975, p.4) Mr. Berman immediately responded that "I am not retained for any fee. I am doing this pro bono for Mr. Estremera" (Minutes of May 9, 1975, at p.5). A few minutes later, the Court criticized Mr. Berman "as retained counsel," for submitting poor quality xerox copies (Id. at p.15).

**/ The government, quite properly, voiced no objection to appellant's motion to have his counsel appointed under the CJA.

appellant was forced to prove this solely through circumstantial evidence, rather than by live witnesses and direct testimony, because there had been no funds for appellant's counsel to travel to Utah to attempt to flesh out the proof of the alibi defense.

Later on in the trial, appellant turned down the Court's offer of a mistrial coupled (erroneously) with a re-trial. Part of appellant's reasoning was that:

> ... he did not want [counsel] to have to go through a re-trial because he knew that [counsel] was not being paid for the case, [Counsel] told him that he should not consider that factor at all His response was that he could not help but consider it.
>
> (Affidavit in support of post-trial motions, dated June 20, 1975, paragraph 7).*

Most significantly, the Court's refusal to appoint appellant's counsel pursuant to the CJA caused counsel to act as his own investigator. Counsel himself interviewed the eyewitness and showed them various photographs. At trial, counsel tried to establish through cross-examination exactly which photos those witnesses had identified when he had interviewed them. But when counsel's recollection differed significantly from that of one of the witnesses (Bolla), counsel was compelled

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*/ The facts alleged in the above affidavit were never contested and the Court found it unnecessary to hold a fact-finding hearing on this point.

to testify himself. The Court ruled that the prosecutor improperly attacked counsel for implied impropriety in the manner in which he had shown the photos to the witness:

> THE COURT: Unfortunately in this case, and I do mean unfortunately, defense counsel felt obliged to testify, and in such a situation the jury identifies not only defense counsel but the defendant with defense counsel. Implied in the [prosecutor's] statement was that there was something improper [on the part of defense counsel].
>
> (T. 479)

Thus appellant, who was certainly indigent, came to suffer from the failure of the Court to grant CJA appoinment to his counsel.

5) The Refusal to Permit a Line-up

Well in advance of trial, appellant, who was in custody for want of bail, moved for permission

> ... to appear in a constitutionally proper line-up, with counsel present, prior to trial and prior to pre-trial identification hearings, and defendant seeks to have all eyewitnesses whom the government seeks at trial ... view said line-up.
>
> (Additional Pre-Trial Motions, filed March 4, 1975, paragraph 3).

Appellant argued that more than two years had passed since the robbery, that he had never appeared in a line-up, that in-court identification of a lone defendant at defense table at trial is suggestive and unreliable, that no one would be prejudiced if a line-up were to be conducted, and that the Supreme Court, in

Simmons v. United States [390 U.S., at 383-384(1968)), had stressed the dangers inherent in identification from photographs. *

On March 10, 1975, appellant argued that identification was the sole issue in this case, that he fully understood the risk of his possibly being identified in a line-up and the effect which that could have at trial, and the fact that he was confident that the witness could not identify him in a line-up (Minutes of March 10, 1975, pp.4-6).

The Court denied the motion, ruling that identification from photographs (done ex parte by the FBI) was "adequate," and that a line-up "could work a tremendous detriment to the defendant" (id., at p.5).**

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*/ See affidavit in support of above motion, paragraph 4.

**/ The Court failed to specify what this "detriment" was, but from the entire colloquy it appears that the Court was referring to its apparent belief that the witnesses would identify appellant.

6) The Pre-Trial Discovery of Defense Photos

When appellant, soon after arraignment, moved for discovery of the photos which the government had shown to eyewitnesses, the government agreed to turn over those photos to appellant, voluntarily, without any court order and without any objection (Minutes of February 19, 1975, pp. 10, 21).

After appellant's counsel had already received these government photos, the government moved, citing Rule 16(c) of the Federal Rules of Criminal Procedure, for discovery of the photos which appellant's counsel had shown to the eyewitness Kenneth Jackson.

Appellant argued that the application of Rule 16 (c) would be unconstitutional in this instance, in that it would conflict with appellant's right to the effective assistance of counsel. He also argued that:

> 1. Rule 16(c) does not give the government an absolute right to seek reciprocal discovery. Rather it permits a court to make its order of discovery by the defendant conditional upon the defendant giving reciprocal discovery to the government. In such a case, the defendant has the option of withdrawing his discovery demand, thereby precluding the government from obtaining reciprocal discovery.
>
> In the instant case, however, the Court never ordered that the defendant's discovery of photos be conditioned upon reciprocal discovery of photos by the government.
>
> The government disclosed its photos voluntarily, without any court order, let alone a conditional order. ...

> Now that we have received the government's voluntarily disclosed photos, it is too late for the Court to issue the type of conditional order envisioned by Rule 16(c), since we can no longer exercise the option, contemplated in Rule 16(c), of withdrawing our discovery demand and thereby not being required to give reciprocal discovery to the government.
>
> 2. Our photos are only discoverable under Rule 16(c) if they are photos "which the defendant intends to produce at the trial." As of today, our photos do not come into this category, since our decision of what we intend to produce at trial cannot and will not be made until the government rests.
>
> (Appellant's Memornadum of Law, filed April 16, 1975, pp.13-14)

The Court granted the government's motion, including discovery of seven defense photographs about which counsel unequivocally stated, in open court, "I will never introduce [at trial]"*(Minutes of May 9, 1975, pp. 10-11).**

All of the nine defense photographs which the Court forced the defense to turn over were photos of Alberto Estremera, and eight of these nine photos showed Alberto dressed in coveralls and helmet. The government thus learned, prior to trial, that appellant's defense was going to a claim that Alberto had been the bank robber in the coveralls and the helmet, and that appellant had been mistaken for Alberto.

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*/ Appellant kept his word and never introduced those seven photos at trial, but the prosecution, at trial, brought out the fact of the existence of these other photos (T. 335-336, 338).

**/ The minutes of May 9, 1975, are paginated continuously with the minutes of the taint hearing. Thus, the above citation might also be "TH. 10-11."

7) The Jury's View of Appellant in Custody and of the Metal Detectors

Prior to jury selection, appellant brought to the Court's attention the fact that the marshals were using metal detectors outside the door of the courtroom, that the public entering the courtroom was being searched with metal detectors, and that the marshals were taking down the names and addresses of all spectators (T.2). Counsel expressed the fear that when the jurors would see these procedures, they would draw an unfavorable inference against appellant's friends and against appellant (T.3).

The motion to discontinue these procedures before the jurors arrived was denied, and the Court directed the marshals to "continue the utmost security in this case" (T.4).

Counsel then reminded the Court that the prospective jurors had sat in other cases during the previous week where there were never any metal detectors and they would thus recognize the presence of the metal detectors in the instant case as evidence of a unique security problem (T.11). He asked the Court to formulate a voir dire instruction which would eliminate the jurors' curiousity about the metal detectors. Even the prosecutor asked that the Court direct the marshals not to employ the metal detectors when the jurors were present, but the Court refused to do so (T.12). Instead, the Court told the

marshals to have the jurors use the Pearl Street elevators, but not until after the jury was selected (T.12). Counsel's request that the Pearl Street elevators be used beginning with the first time the panel was to be brought up was denied (T.13).

Counsel then pointed out that a marshal was sitting directly behind appellant, only four feet away, within the rail which divided the front of the spectator section(T.13), that the man was thus obviously a marshal, and that his proximity to appellant stressed the security issue suggested by the metal detectors (T.14). The marshal was the only person within that rail (other than the Court's two women law clerks) who was not introduced to the jury. The Court denied the application to have the marshal move to the spectator side of the rail (T.14).

During the jury selection, a recess was declared (T.18). Counsel turned to the marshal seated directly behind appellant and twice asked (out of the jury's hearing) not to take appellant out of the courtroom until after the jury had had left the room. The marshal did not answer counsel, and, instead, the marshal marched appellant out right in front of the jury box while the jury was still in the box T.18-19). The prosecutor noted that appellant had been "walked out of the courtroom with a marshal in front of him and one behind him" (T.18), and counsel noted that several of the jurors had turned their heads and had

followed the progress of appellant and the marshals(T.21).

Appellant argued that he was entitled to a trial "without the jury knowing that he is in custody" (T.18). The Court reserved decision (T.21), and, after lunch, denied the motion for a new panel (T.23).

8) The Trial

James Bolla testified that he was the bank manager and was present at the time of the robbery (T.54). He identified appellant as one of the robbers (T.59). The entire robbery took less than three minutes(T.62).

The surveillance cameras were activated during the course of the robbery(T.63), and Bolla identified various surveillance photos which were received in evidence without objection(T.65).

Bolla testified, on direct examination, that in March, 1975, appellant's counsel showed him a spread of six photographs (T.71). Subsequently, in the prosecutor's office, Bolla had told the prosecutor that counsel had shown a photo spread. The prosecutor, in his office,had then shown Bolla the six photo that made up Gov. Exh.43* and hadsuggested to Bolla that those

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*/ The prosecutor had naturally assumed that counsel had used the same six photos as those in Exh. 43, because Exh. 43 was the six photos which the FBI had shown to the other two eyewitnesses,and the prosecutor had earlier given the defense copies of those photos. Exh.43 consisted of appellant's photo(43-C) and photos of five stand-ins (43-A-B-D-E-F). Counsel later testified that the photos which he had shown Bolla were the same five stand-ins and a photo of Alberto (Exh.G), and not of appellant.

six photos were the same ones which appellant's counsel had shown him:

> You asked me possibly could it have been these, and I said, 'Yes, these were.'
>
> (T.79; see also T. 119)

At trial, Bolla, already willing to believe that it was Exh. 43 which counsel had shown him, testified that he had identified 43-C as the robber (id.). *

On cross-examination, Bolla, who had identified appellant by name (T.59), revealed that the prosecutor had given him appellant's name(T.97). He further acknowledged that he knew that appellant was on trial and that he had fully expected appellant to be in the courtroom at the defense table (T.98).

On the date of the bank robbery, Bolla told the FBI that the robber with the coveralls and the helmet was between 33 and 35 years old(T.105-106). Appellant was 25 years old at the time of the robbery (T.310).

Near the end of cross-examination, Bolla agreed that the photo of Alberto Estremera may have been among those shown to him in March by defense counsel and that

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* / It was stipulated that 43-C was a photo of appellant. The whole question with regard to Bolla's testimony was whether he was correct in accepting the prosecution's suggestion that 43-C had been among the spread which counsel had shown him.

he did recall seeing that particular photo (T.121).*

Rodolfo Romero was employed as a guard at the bank at the time of the robbery(T.133). During the robbery, Romero was made to lie down on the floor(T.136). As the bank robbery was ending (T.138), and the robbers were ready to leave, Romero was searched by a Spanish speaking man who sat on top of Romero(T.139) for a minute or less (T.142). Romero identified appellant in court as that man (T.140), but only after walking right past appellant once without identifying him (T.141).

Six days after the robbery, FBI agents showed Romero the Exh. 43 photo spread and he identified 43-C(T.147).

On cross-examination, Romero identified Defense Exhibits A through E as a fair representation of the man with the helmet when he was sitting on Romero's back (T.150-151) and neck (T.153).

The man's back was toward Romero's face (T.154) and Romero was in pain and it was difficult for him to pick his head up (T.157). He was also frightened (T.160).

It was stipulated that on November 4, 1974 (almost two years after the robbery and only four months before the Simmons hearing), the prosecutor showed Romero a single photo, 43-C -- the photo of appellant (T.164-165).

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*/ Exhibits G and G-1 were both photos of Alberto printed from the same negative.

Law enforcement officials never showed Romero a photo of Alberto Estremera (T.165), and Romero had learned of appellant's name from law enforcement officials (T.166). When he came into the courtroom, Romero "presumed" that appellant would be there, sitting at the defense table (T.167).

Describing his degree of certainty in identifying appellant, Romero spontaneously suggested the possibility that he might have been confused if appellant had a "double" or a "twin brother" (T.168).*

Leroy Irvin lived in the neighborhood of the bank and he observed the robbers switch cars from the original getaway vehicles to a red van, the license number of which he succeeded in writing down (T.189).

Detective John Hughes testified that on February 15, 1973, while investigating the instant bank robbery, he found the red Ford van parked opposite 354 Saratoga Avenue in Brooklyn (T.194). The license number was virtually the same as the one recorded by Mr. Irvin(T. 198). Oscar Washington, whom Hughes identified as one of the robbers in the bank surveillance photos, was arrested as he approached the red Ford van (T.199).

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*/ The defense exhibit, of course, indicates that Alberto is indeed such a look-alike for appellant that he could easily mistake one brother for the other.

Frank Negron, a long-time friend of appellant (T. 214-215), testified that on February 15, 1973 (six days after the robbery), he saw appellant at Negron's home in Brooklyn (T.215).

Negron had known at that time that Alberto Estremera was one of the people arrested at 354 Saratoga Avenue that day (T.217), and appellant asked Negron about what had happened at that address (T. 216).* Negron then provided appellant with a change of clothes (T. 217).

After the prosecutor failed to refresh Negron's recollection about other statements possibly made by appellant (T. 217), the prosecutor, over several objections, most of which were sustained, persisted in attempting to lead Negron and to put words in his mouth:

> [THE PROSECUTOR]: Did he tell you the police were looking for him?
>
> [NEGRON] : ... I'm not certain.
>
> MR. BERMAN: Objection.
>
> THE COURT: No, no, wait a second. That is not his testimony. ...
>
> MR. BERMAN: Your Honor, I think that we have gone through a leading question, a summarizing of testimony, and then a misstatement of testimony, and I ask that some admotition be given so this doesn't happen in the next batch of questions.

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*/ The record is not absolutely clear on this time sequence, but it appears that Negron first told appellant about Alberto's arrest and that appellant then responded by asking for more details.

THE COURT: It won't. Don't worry about it.

MR. BERMAN : Thank you, your Honor.

Q: There seems to be some lack of clarity in the record. Will you tell us, please --

MR. BERMAN: Objection to that gratuitous remark. ...

THE COURT: ... The remarks will be stricken from the record.

(T. 218-219)

Negron obtained from a friend, Blanca Arroyo, the key to her apartment, and, later that night, he saw appellant at Blanca's apartment (T.221-222). Appellant told Negron that he needed money (T. 223). Negron also ordered a pair of eyeglasses for appellant. Appellant's nickname was "Curly." (T.224).

On cross-examination, Negron acknowledged that prior to February 1973, he had failed to report for induction into the armed forces (T.225). Negron also knew that appellant was "running from the draft" in February of 1973:

"That's old news for us."

(T. 226).

Negron and appellant had, prior to 1973, served together in the Job Corps in Clearfield, Utah, and both had friends in the Clearfield community (T. 226-227). Negron was positive that appellant had remained in contact with his friends in Utah as of 1973, and it was

"common knowledge," according to Negron, that appellant, in 1972 and 1973, travelled across the country several times. Prior to February 15, 1973, Negron had not seen appellant for two weeks (T.228).

Appellant was definitely not a resident of 354 Saratoga Avenue; Alberto Estremera definitely was (T.229).

When Negron saw appellant on February 15, 1973, there was no discussion of a bank robbery; to the contrary, appellant said he needed money.* On that occasion, Negron saw no money in appellant's possession, nor did appellant have any weapons or any helmet or any coveralls (T. 230).

Blanca Arroyo testified that on February 15, 1973, she saw Negron and a friend of Negron's outside Negron's house, and Negron asked her to lend him her apartment. The friend accompanied Blanca to her place and Negron arrived there that evening (T. 241-242). Negron and the friend, who was called "Curly," had a conversation about bringing Curly his eyeglasses. Blanca left for her parents' home and never saw Curly again (T. 243).

On cross-examination, Blanca stated that Curly had no money or weapons and that there was never any talk of a bank robbery (T. 244).

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*/ More than $25,000.00 had been taken in the bank robbery.

Ruven Matias, whom the prosecutor sought to call, was not allowed to testify, with the Court ruling that most of Matias' testimony would be irrelevant (T. 265; see discussion, infra).

Milton Ahlerich, the FBI agent in charge of this case, testified, over objection, that he could identify Monges and Cumberbatch as two of the robbers in the bank surveillance photos (T. 277-278, 289).

Ahlerich verified that the getaway van, registered to Alberto Estremera, had never been reported stolen, and that he, Ahlerich, was present on February 15, 1973, when Alberto was arrested inside 354 Saratoga Avenue in connection with the instant case. Ahlerich did not know where Alberto was at the time of appellant's trial (T. 292-293).

Through Agent Ahlerich, appellant introduced in evidence Exh.J, a more recent photo of appellant than Gov.'s Exh C was (T. 295-297).

After his motion for a judgment of acquittal at the close of the government's case was denied (T. 304), appellant called several witnesses:

Joseph Winckler, of the Operations Division of the Selective Service System, testified that he had been working for Selective Service for the past 25 years and was fully familiar with the procedures and record-

keeping done and the forms used by that agency (T. 307-308). Winckler had brought with him appellant's Selective Service file (T. 308), which had been forwarded to headquarters after appellant had been reported to the United States Attorney (for the Eastern District of New York) as a draft violator (T. 314).

The "last address of record" for appellant, which Selective Service had for a period ending in 1974, was in Clearfield, Utah. All prior addresses had been crossed out, which indicated a change of address to the Clearfield, Utah, address (T. 315).

The 'minutes of action' of the local board* recorded all mailings which had been sent to appellant, and also recorded which of those had been returned and the reason they had been returned (T. 316). Various notices sent to appellant, including induction notices, had been returned by the post office as undeliverable (T. 318-324).

On February 8, 1973 (the day before the bank robbery), a letter was mailed to appellant at the Utah address. According to the file, this letter was never returned (T. 325). The file contained a copy of that letter, which was received in evidence as Exh. K-3 (T. 326). The complete text of that letter is as follows:

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*/ Which were received in evidence as Exh. K-2(T.317).

Feb. 8. 1973

SSN: 50 45 47 583
RSN: 0700 045

Mr. Raul Estremera:
Advance Institute PO BOx 1327D8-33
JCC Clearfield, Utah 84016

Dear Sir:

This is to advise you that you are under Indictment for failure to comply with the Military Selective Service Act.

BY DIRECTION OF THE BOARD

A. HARNIK, EXEC. SEC.

Abby Robinson, a professional photographer, testified that on March 8, 1975, in appellant's counsel's office, she took some photographs of Alberto Estremera while he was dressed in coveralls and a helmet (T. 331,334), and also some full-face photos of him in regular clothing. She identified Exh's. F and G and G-1 as being among those photos she took of Alberto (T. 332), and these were received in evidence (T. 334).*

On March 14, 1975, Ms. Robinson gave the photos to appellant's counsel (T. 333).

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*/ G and G-1 were both printed from the same negative, but were of different sizes (T.333). By consent, G-1 was later taped over G by the clerk, to make the exhibit the same size as the photos in Exh. 43 (the six-photo spread) and the exhibit was thereafter referred to simply as "G" (T. 343, 356, 358).

On cross-examination, the prosecutor brought out the fact that there were other photos of Alberto taken that day - other than the three offered by appellant (T. 335-336). These, of course, included the seven ones which the Court had forced the defense to turn over prior to trial under its interpretation of Rule 16 (c).

Kenneth Jackson, the head teller, who had been present in the bank at the time of the robbery, was called by the defense.*

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*/ At the Simmons hearing, which was prior to the time Jackson identified Alberto as the robber in the coveralls and helmet, the prosecutor vouched for Jackson's opportunity to observe:

> ... it was adequate under Neil v. Biggers .... Jackson obtained a full face view of the defendant. ... Jackson's clear and unobstructed view of the defendant's face ... is adequate.
>
> (Gov's Memo, filed April 4, 1975, p.8).

At the trial, after he learned that Jackson had identified Alberto, the prosecutor seems to be talking about a different Jackson:

> .. he hardly got a very good look at the defendant. ...
> We didn't put Mr. Jackson on because frankly, ladies and gentlemen, Mr. Jackson's view of the defendant was really not much better than the view of any of those people lying on the bank floor with their heads covered.
>
> (Prosecutor's Summation, at T. 459).

During the robbery, Jackson saw the robber with the coveralls and the helmet, and he had described the robber as between 5'9" and 6' tall (T. 350). *

On March 14, 1975, Jackson was visited by appellant's counsel,** who showed him some photos (T. 352). One of these photos was Exh. F, a picture of Alberto. Counsel did not tell Jackson anything about whom Exh. F depicted, other than that all the photos had been taken in counsel's office. All the writings on the back of F were made by Jackson, in his own handwriting, during that March 14 interview (T. 353). At that time, counsel had asked Jackson if he recognized anyone in the photos which he was showing Jackson (T. 354).

Jackson's endorsement on the back of Exh. F, the photo of Alberto in coveralls and helmet, was received in evidence, and it read as follows:

> 3/14/75. This photo represents one robber during robbery of FNCB at 505 Southern Boulevard, 2/73.
>
> [signed] Kenneth M. Jackson
>
> (T. 355)

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*/ Appellant is 5'8".

**/ Counsel had informed the prosecutor in advance of his intent to interview the bank witnesses, and the prosecutor had expressed no objection (T. 369).

On that same day, Jackson also wrote the following endorsement (which was received in evidence), (T. 356) on the back of Exh. G, the photo of Alberto in regular clothing:

> The man pictured here is robber who wore construction helmet during robbery at 505 Southern Boulevard, Bx, N.Y. 2/73. I am positive.
>
> [signed] Kenneth M. Jackson
> 3/14/75

Appellant brought out the fact that, after the robbery, Jackson had been shown the Exh. 43 photo spread by the FBI and had chosen C [appellant] (T. 357).

At trial, Jackson testified that when he wrote the above on the back of Exh. G, he was indeed positive:

> Yes. I was positive when I wrote on the back of the photo.
>
> (T. 371).

After writing that, there came a time, prior to trial, when Jackson was interviewed by the prosecutor, and the prosecutor told Jackson that he had identified the wrong person (T. 371).

Jesse Berman, appellant's counsel, then took the stand.** He corroborated Ms. Robinson's description

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*/ Appellant's counsel, on the other hand, never said anything to Jackson to reinforce his identification of the twoo photos of Alberto.

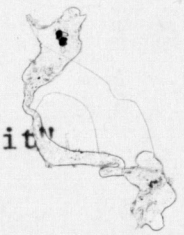
**/ Mr. Berman was examined on direct by Lawrence Stern, Esq.

of the taking of the March 8, 1975, photos of Alberto Estremera in counsel's office (T. 373).

On March 14, 1975, Mr. Berman showed Mr. Bolla a spread of six photos: Exh. G (Alberto) and Exh. 43-A-, -B, -D, -E and -F. He never showed Bolla Exh. 43-C (appellant) (T. 377-378).

Mr. Berman also corroborated the essential details of Jackson's description of the manner in which Mr. Berman had shown him the photos of Alberto and the manner in which Jackson had identified and endorsed Exh. F and Exh. G (T 378-381).

On cross-examination, Mr. Berman testified that Bolla had (on March 14, 1975) identified Exh. G (T. 381). Mr. Berman did not tell Jackson what to write on the back of the photos (T. 387). He did not ask Bolla to write anything or to initial any photos, because the idea first occurred to him later that day, when he saw Jackson, and he asked Jackson "to put on the back whatever he had to say about it" (T. 387-388).



The prosecutor, during cross-examination, accused appellant's counsel in front of the jury:

> After Mr. Jackson identified the photographs you knew that you had induced misidentification --
>
> (T. 386)*

---

*/ The objection to this remark was sustained and the jury was told to disregard the remark (T. 386).

The defense rested (T. 388).

The Court had earlier ruled that Ruven Matias' testimony was irrelevant and prejudicial, and that, as counsel argued, since jeopardy had attached, the prosecutor's use of prejudicial evidence would bar re-trial (T. 263-263a, 265). The prosecutor, obviously upset, continued to argue (T. 265-267), and later renewed his offer (T. 389), but the Court stood by its ruling (T. 267, 389).

On the following morning, prior to summations, the Court warned both counsel to be very careful in their summations and to not, "get into politics or anything else" (T. 403-404).

During his summation the prosecutor made the following remarks:

> Ladies and gentlemen, don't let Mr. Berman misrepresent the record. Don't let him misrepresent the facts.
>
> (T. 447).

> Mr. Bolla testified that he did not pick out Alberto Estremera. Mr. Berman has testified that he did.
> Regardless of the facts of that and, of course, Mr. Berman didn't come into court with any initials of Mr. Bolla on the back of any photograph the way he did with Mr. Jackson. You didn't see Mr. Bolla confronted with any evidence of identification of Mr. Estremera.
>
> (T. 457).

I submit to you that you can compare the methods Mr. Berman used in inducting [sic] the identification from Mr. Jackson and the methods used by the FBI.

He didn't show Mr. Jackson a photo spread. He dressed someone up in clothing identical to that of the bank robber and he managed to trick Mr. Jackson into making that identification.

Ladies and gentlemen if the government had dressed up Raul Estremera in coveralls and a hard hat and had photographed him and had shown that photograph to a number of bank witnesses and had tried to produce that evidence in court, Mr. Berman would be here screaming that the government had engaged in all sorts of impropriety, that the government improperly induced the identification.

Ladies and gentlemen, impropriety is no better when engaged in by the defendant than it is when engaged in by the government.

(T. 460-461)*

Ladies and gentlemen, as I told you, drowning men grasp at straws. The straw that Mr. Berman is clutching at is the straw of Mr. Jackson's identification, of Mr. Jackson being tricked into identifying Alberto Estremera.

(T. 462)

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*/ Pursuant to objection, the Court ordered, "We have gone far enough on that." (T. 461) Nonetheless, the prosecutor persisted (See, T.462 at top).

You heard Mr. Berman testify on direct examination that he showed photographs to Mr. Bolla and to Mr. Romero -- and to Mr. Jackson, excuse me. There was no mention ladies and gentlemen, of Mr. Romero in Mr. Berman's direct examination.

Then you heard me on cross-examination ask Mr. Berman, by the way, did you show that photograph of Alberto to Mr. Romero?

I think then you heard Mr. Stern get up and object and say, your Honor, it is beyond the scope of direct examination.

(T. 462-463) *

Think about one other thing, think about Mr. Negron's testimony. Now, ladies and gentlemen, you heard Mr. Berman state twice. I believe, in his summation, Mr. Negron testified Mr. Estremera wasn't in New York during the previous two weeks.

What he testified was this:"Now, isn't it true that you hadn't seen Mr. Estremera for two weeks?"
"Something around there, yes."

"And as far as you know, Mr. Estremera was not in New York?

"Answer. I figure he probably was."

That disposes, ladies and gentlemen, of Mr. Berman's contention about that.

(T. 469) **

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*/ Pursuant to objection, the Court instructed, "All right. You don't have to go into that either. An objection is properly made by counsel at all times in matters of law, which I have to handle." (T. 463).

**/ Objection noted and record corrected (T. 469-470).

> Ladies and gentlemen, another point about the draft documents. Mr. Berman in his opening described Mr. Estremera as a draft resister and I think you heard him state in his closing argument that he was opposed to the Vietnam War and that is why he was evading the draft.
>
> Ladies and gentlemen, perhaps I'm construing words too carefully, but to me, and to, I think, most people who lived through the 1960s, draft resistance has a particular connotation. It raises the image of Dr. Spock and William Sloan Coffin and marches on the Pentagon in opposition to the war, and a belief in non-violence.
>
> (T. 475) *
>
> Ladies and gentlemen, the draft is a significant issue here, and I think you remember that Judge Duffy asked you all, in your voir dire, about your attitudes toward the draft. And I think one of the jurors, I think it was Mr. Crookshank, if I'm not mistaken, said that he believed in some form of alternate service.
>
> Ladies and gentlemen, this is the form of alternative service that Mr. Estremera chose (indicating).
>
> (T. 476).

At the close of the summation, a motion for a mistrial was made, and after recess and contemplation, the Court granted the motion, but coupled its ruling with the simultaneous ordering of a retrial. After discussion between appellant and his counsel, a decision was made to withdraw the motion, and the case proceeded to verdict:

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*/ Objection was made and the Court ordered, "That is exactly what I didn't want to hear... Stay with the evidence in the case" (T. 475-476). Nonetheless the prosecutor persisted (See T. 476).

THE COURT: Unfortunately, in this case, and I do mean unfortunately, defense counsel felt obliged to testify, and in such a situation the jury identified not only defense counsel but the defendant with defense counsel. Implied in the statement was that there was something improper. If we try this case again, there will be nothing like that.
Do you still move, Mr. Berman?

MR. BERMAN: Yes, your Honor.

THE COURT: All right, Motion for a mistrial is granted.
All right, Mr. Marshal.

MR. BERMAN: So that we understand, your Honor --

THE COURT: It is on the totality of the entire totality of the entire thing, is that what you are talking about?

MR. BERMAN: Well, yes, but the point that I urged most strongly was the part that the summation ought not to go into political arguments, and my position that that was deliberately a violation of the Court's ruling, and virtually forced the mistrial situation.

THE COURT: I understand.

MR. BERMAN: We are between Scylla and Charybdis in that we have this problem of this having come out, and we have invested the time and revealed what our defense was.

THE COURT: I'm well aware of that. Mr. Berman, I assure you, the last thing I want to do is to try this case over, but I have to.

MR. BERMAN: One second, please, your Honor, I just want to confer with Mr. Estremera and Mr. Stern.

THE COURT: Sure.

(Pause.)

MR. BERMAN: Your Honor, I must state that Mr. Estremera's position is that he does not

a mistrial, and what he says to me is that he would prefer that the Court tell the jury that they should disregard that matter.

Apart from his requested instruction, I I think I have to go by what he wants, and its his case, and he wants to proceed.

THE COURT: The motion was already made; it's already been granted.

MR. BERMAN: It doesn't make any difference. I think, your Honor, nothing has flowed from that yet. We haven't told the jury they're discharged. Absolutely nothing has flowed from that and I think the matter is still the subject of discussion for another minute or two, and I must say I should confer with Mr. Estremera before I say something as final as consenting to a mistrial. His position is that he wants to go ahead, and if that's the case, we have to say that we want to go ahead.

THE COURT: I have had the Court Reporters reading to me now for a number of minutes. It is now ten minutes to 2. How much more time do you want to consult with the man?

MR. BERMAN: I will just take one minute now and I don't think the Court has to go off the bench or declare a recess.

I just want to take one more minute to make sure that I have Mr. Estremera's thoughts on this very clear and I will tell the Court as soon as I speak to him.

THE COURT: Counselor, wait a second.

There are two obligations you have. One is most obvious, and that is that you have to not only consult with your client, but also advise him. I don't think that in any sense that you were being frivolous when you made the motion to begin with.

I asked you if you still had the motion out before I ever made a ruling on it.

MR. BERMAN: I understand what the Court is saying.

THE COURT: It's got to be a two-way street.

MR. BERMAN: Mr. Estremera would like to address the Court on this. He is not going to talk about anything that might incriminate him. He just

wants to state his feeling on this legal question.
Will the Court hear Mr. Estremera?

THE COURT: Sure.

DEFENDANT ESTREMERA: Your Honor, I did not understand --

THE COURT: Stand up. I can't hear you while you are sitting down.

DEFENDANT ESTREMERA: I would have spoken to Mr. Berman had I heard your statement, but I didn't totally understand it, what you meant by "Does your motion still stand?"
I did not understand that.

MR. BERMAN: Your Honor, I should also reflect that today during the lunch hour is the first time in the course of the trial that I did not see Mr. Estremera at all. I did not go downstairs, because it was a shorter lunch hour than usual.

THE COURT: I understand.
Do you want a couple of minutes to talk to him?

DEFENDANT ESTREMERA: Yes, I'd like that also.

MR. BERMAN: Thank you, your, your Honor.

(RECESS)
(Jury not present)

THE COURT: All right, Mr. Berman.

MR. BERMAN: Your Honor, Mr. Stern, Mr. Estremera and myself have had a conference, and Mr. Estremera has had a chance to speak to some members of his family, and we are in agreement with him now that -- the defense attorneys are now in agreement with Mr. Estremera that for the reasons that he stated to us, that he wants to continue with this trial.
He feels that if no instruction is given, perhaps the jury is not going to remember it. He would prefer that no curative instruction be given to the jury, and that we just leave matters as they are and then proceed.

He wants to have this matter resolved. He feels it's been a drain on himself and his family and he just does not want another trial at this point.
And I have to go along with his wishes.

THE COURT: You are withdrawing your motion for a mistrial?

MR. BERMAN: I therefore am withdrawing my motion, your Honor.

(T. 479-484)

9) The Post-Trial Motions

Prior to sentencing, counsel submitted post-trial motions in arrest of judgment and for dismissal of the indictment, accompanied by an affidavit in which he related conversations with the prosecutor, both post-summation and during jury deliberations, wherein the latter said

> that he would not be disappointed if the Court were to grant the motion [for a mistrial] because he would then be able to mandamus this Court in the Second Circuit in order to compel this Court to allow Ruven Matias to testify at the re-trial. Mr. Epstein also said he was sure the Circuit would rule against this Court and in favor of the government.
>
> (Affidavit in support of Post-Trial Motion, paragraph 2.)

Counsel alleged that "Mr .Epstein deliberately made these serious, prejudicial comments in his summation in a purposeful, calculated attempt to force a mistrial, so that he could then mandamus this Court in the Second Circuit and compel it to allow Matias to testify and thus increase the probability of a conviction herein." (See post-trial

motion, p.3, para. 7). Counsel argued that

> Because the prosecutor purposely and illegally sought to make Mr. Estremera choose between (1) continuing a trial "without due process of law", or (2) "for the same offence to be twice put in jeopardy," (5th Amend.) the appropriate remedy here is arrest of judgment and dismissal of the indictment. In the alternative, this Court should, " in the interest of justice," (Rule 33), gant a new trial at which Matias would not be allowed to tesify.
>
> (Post-Trial Motions, p.3, paragraph 10).

These motions were denied, the government having submitted no affidavit to oppose the factual allegations made by appellant's counsel.

10) The Sentence

The presentence report established that appellant "adjusted well in the community," "was of high average intelligence" and had worked as a volunteer community worker (S.13).* An unusually large number of letters had been written to the Court, urging that appellant be placed on probation and returned to the community. Included among these were letters from a State Senator, two clergymen and a number of administrators of anti-poverty programs in appellant's Brooklyn community (S. 14). Many of them praised appellant's work in running food programs for the poor and in developing a cold-turkey, drug-free technique method of combatting and curing drug addiction(S.15).

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*/ "S" refers to minutes of sentence, June 24, 1975.

The evaluation section of the report suggested a sentence of 54 to 135 months (4½ to 11¼ years), and mentioned the possibility of sentencing under 18 U.S.C. Section 4208(a) (2). Counsel noted that appellant was essentially a first offender, except for his misdemeanor mischief case four years earlier (S. 18).

Appellant, who was trained in the nutrition field, had run free breakfast programs, both in Brooklyn and on the West Coast. A petition signed by thousands of residents of the Ocean Hill-Brownsville community had been received by the Court, praising appellant and asking that he be returned to their community (S.20).

Counsel pointed out several serious differences between appellant and his two co-defendants, Washington and Monges, each of whom the Court had sentenced to 18 years imprisonment. One of those two had pistol-whipped the assistant manager during the robbery, whereas there was never any claim that appellant had been physically violent (S. 21). Monges had been arrested in possession of a bomb (C.9),* while Washington had apparently been linked to anti-tank and anti-personnel weapons (C.8). Both Monges and Washington had prior records (C.9). Moreover, the Court had, in sentencing the two co-defendants commented on their obvious in-court contempt for the judicial system (C.10).

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*/ "C" refers to the minutes of sentencing of the co-defendants Washington and Monges, June 21, 1973.

Counsel also demonstrated that there were indeed many categories of armed bank robbers whose cases called for heavier sentences than appellant: those who kidnap or take hostages, those being sentenced for bank robbery for the second or third time, those who are being sentenced at one time to cover several bank robberies, those with any sort of prior felony conviction, those who discharge firearms during the course of the bank robbery, and those who injure someone during a bank robbery. Appellant falls into none of these aggravated categories (S. 22-23). Appellant had a wife and three children, and the instant robbery had happened 2½ years before appellant's sentence, and appellant had already served 1½ years in jail prior to sentence (S. 23).

The Court, however, was concerned with only "one particular incident, and that incident was the bank robbery" (S. 25). In sentencing appellant, the Court referred only to the fact that the crime had been one of bank robbery. It gave appellant credit for the year he served in jail in Canada (January 28, 1974 - January 6, 1975), and, after mentally deducting that year from the identical 18-year sentence it had imposed on the co-defendants, the Court sentenced appellant to 17 years imprisonment and denied a request to impose that sentence under Section 4208(a)(2). (S. 26).

## ARGUMENT

### POINT I

APPELLANT WAS DENIED A SPEEDY TRIAL UNDER THE LOCAL RULES BY THE GOVERNMENT'S FAILURE TO MAKE ANY EFFORT TO OBTAIN HIS PRESENCE FOR TRIAL DURING A NINE MONTH PERIOD WHEN IT KNEW HE WAS DETAINED BY CANADIAN AUTHORITIES.

Under Rule 4 of the Southern District Plan for the Prompt Disposition of Criminal Cases (the "Plan"), the government must be ready for trial within six months of the filing of the indictment.*

The government never filed a notice of readiness in this case and the trial occurred over two years after indictment.** For almost one year of this period, the government was not aware of appellant's whereabouts, and thus, under Rule 5(d) of the plan, the running of the six month limitation in Rule 4 was tolled.*** However,

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*/ The events giving rise to this appeal all occurred while the Plan and not the Speedy Trial Act of 1974 was the governing law. United States v. Furey, Docket No. 74-2266 (2d Cir. Feb, 25, 1975)

**/ Appellant was indicted in February, 1973, and the case proceeded to trial in May 1975.

***/ Rule 5(d) provides that the six month period is tolled if the delay results from "the absence" of the defendant and that a defendant is "considered absent whenever his location is unknown.."

once the government became aware of appellant's whereabouts in the Montreal jail, the Rule 5(d) exception was no longer applicable and the six month time limitation of Rule 4 began to run.

The government became aware of appellant's whereabouts in the Canadian jail on January 30, 1974, but made no effort to extradite him from Canada until October 31, 1974, nine months later. This nine month delay before commencing extradition was totally unwarranted, caused appellant to remain in a Canadian jail and deprived him of a speedy trial.

The government claimed below that this nine month period, during which it made no effort to extradite appellant, was excludable under Rule 5(f). This rule provides that

> The period of delay resulting from detention of the defendant in another jurisdiction [is excludable] provided the prosecution has been diligent and has made reasonable efforts to obtain the presence of the defendant for trial.
>
> (Emphasis added)

Thus, in order to exclude that nine month period, the prosecutor must prove that he has been "diligent" and has made "reasonable efforts" to obtain the presence of defendant for trial.

The uncontradicted facts in this case make clear that the government made absolutely no effort, during that period, to obtain appellant's presence for trial, much less did it make the "diligent" and "reasonable efforts" required

by the rule. The government did not initiate extradition proceedings during that period, nor did it make an extradition demand. Moreover, extradition was available, quick and certain. Once the government finally did begin extradition proceedings, it took but two months to obtain appellant's presence for trial.

The government argued below that it met the "diligent" and "reasonable efforts" standard required by Rule 5(f) because it believed that appellant would be deported by the Canadian government during that nine month period. That is to say, the government admits sitting by passively and claims this complies with Rule 5(f). This Court should not accept such an illogical interpretation. The rule requires the government to take an active and aggressive role in obtaining a defendant's presence for trial. For the government not to make diligent and reasonable efforts, but to rely on the proceedings of a foreign jurisdiction, is to operate as if the speedy trial rules did not exist.

The government further claimed below that the nine month delay in seeking the extradition of appellant was caused by its "erroneous reading of Canadian law" regarding deportation. This is simply not the case. Rather, the Assistant United States Attorney relied on the opinion of a Platts[illegible]rgh F.B.I Agent, Edward McShane, who decided to await deportation and not to seek extradition. Apparently this agent believed that because appellant had a

criminal record, he would be deported. However, appellant only had one conviction, for a misdemeanor, and thus was not deportable. Had the Assistant United States Attorney, whose responsibility it was to insure compliance with Rule 5(f), checked appellant's criminal record, which the government obviously possessed, he would have known immediately that appellant was not subject to deportation and he would have immediately begun extradition proceedings. Rather, he relied on the opinion of a non-lawyer FBI agent and failed to do even the most minimal checking. Such negligent, in fact, reckless conduct, by the government cannot be said to comply with the "diligent" and "reasonable efforts" madated by Rule 5(f).

However, even assuming that the government was not at fault in believing that appellant would be deported, this still is not an excuse for delaying extradition proceedings. The rule was enacted so that the government would not passively rely on some other jurisdiction's laws, but would actively seek to obtain the presence of a defendant. The government would never have found itself nine months later in a position in which the vagaries of a foreign jurisdiction's laws could determine whether a United States defendant would be present for trial, had it obeyed the Rule's mandate to act diligently and make reasonable efforts.

Additionally, deportation is generally a lengthier and more speculative proceeding than extradition, particularly

here,where appellant was indicted here for a felony and was in custody in Canada. As this Court knows from recent experience [John Lennon v. Immigration and Naturalization Service, ___F.2d ____ (2d Cir., October 7, 1975, slip op. 139)], deportation can take many years and is often not successful. "Diligent" and "reasonable efforts" to obtain a defendant's presence require the most expeditious method of obtaining his presence.

The burden imposed on prosecutors by Rule 5(f), to employ diligence and reasonable efforts, is similar to that imposed by the Constitution on jurisdictions which have charges pending against a defendant serving time in another jurisdiction. In such cases, authorities must make "diligent, good faith efforts" to bring defendants to trial. Smith v. Hoey, 393 U.S. 374 (1969). This language has been interpreted to mean that a prosecutor must request extradition, and not simply await the expiration of a sentence, short as it may be. Pitt v. State of North Carolina, 395 F.2d 182(4th Cir. 1968); United States v. Banks, 370 F.2d 141(4th Cir. 1966). Moreover, a prosecutor must make "every good faith effort to bring accused to trial." Hoskins v. Wainwright, 485 F.2d 186(5th Cir. 1973)(emphasis added). For example, in United States v. Banks, supra, the Court found that it was improper for prosecutorial authorities to await the expiration of a ten month sentence in another

jurisdiction, rather than to seek extradition. Id. at 144 If such a ten month wait, for what was to be the definite release date of a defendant to federal authorities, cannot be comsidered "diligent, good faith efforts," then cerainly the government's speculative waiting in this case for the outcome of Canadian deportation proceedings cannot constitute "diligent" and "reasonable efforts."

Nor can the government claim that United States v. Oliver, Docket No. 74-2412(2d Cir., decided June 17, 1975), dictated a different result. Oliver, although mentioning Rule 5(f), relied primarily on Rule 5(d), stating that the period of time in issue was excludable because the defendant was "unavailable" and "reasonable, but unsuccessful efforts were made to secure his presence." Id. at 4071. The prosecutor in Oliver filed a petition for a writ of habeas corpus ad prosequendum and withdrew the writ only after it was determined that the defendant was undergoing a psychiatric observation, possibly lasting sixty days and that his presence was required in Michigan for "expeditious disposition of the state proceedings." These facts were the basis for this Court's holding in Oliver that the "decision to dismiss the writ as requested by the state prosecutor was reasonable under the circumstance of an expeditious prosecution of a more serious state prosecution."

No such situation is present here. The Canadian government did not request the United States government to refrain from extradition; in fact, extradition would have

mooted deportation. Nor was there any current, serious Canadian charge against appellant; he was simply going through civil deportation proceedings. Under such circumstances it was totally unreasonable and hardly diligent for the government to await the outcome of Canadian deportation proceedings.

This Court should find that the government's passive attitude toward obtaining appellant's presence for trial denied him his right to a speedy trial and requires dismissal of the indictment herein.*

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*/ Although appellant need not show any specific prejudice to him under the Rules(as opposed to a Sixth Amendment speedy trial claim), we note, for this Court's comsideration, that this nine month delay contributed at least in part to the fact that, by the time appellant was finally tried, the building housing the bank had been razed, several bank employees had moved and could not be found, none of the bank customers could be located by appellant(see affidavit of March 14, 1975), memories were poorer, and, most significantly, the jury got the impression that appellant had been a fugitive that much longer. Since, by the time appellant's case finally came to trial, President Ford's clemency program had eliminated a substantial number of draft fugitives and the Vietnam war had ended,and, draft fugitives were something from the more remote past, and the jury did not know that appellant had been in custody since January 28, 1974, they were left with the mistaken impression(which appellant could not correct without admitting that he had been in custody for that period of time), that appellant had remained at large as a fugitive through all of 1974 and half of 1975. This seriously undercut his claim that, in his mind, he was only a fugitive from the draft, because the jury might well have believed that if appellant had been running only from the draft, his running would have ended a year earlier and he would have been tried that much sooner. Thus, the delay in bringing appellant from Canada to trial might well have made the jury feel that he had something else to keep running from, to wit, the bank robbery.

## POINT II

PROSECUTORIAL MISCONDUCT, DESIGNED TO EITHER EFFECT A GUILTY VERDICT OR TO INDUCE A MISTRIAL WHICH WOULD AFFORD THE PROSECUTION AN OPPORTUNITY AT A SECOND TRIAL TO IMPROVE ITS CASE, DEPRIVED APPELLANT OF HIS FIFTH AND SIXTH AMENDMENT RIGHTS TO SINGLE JEOPARDY, DUE PROCESS OF LAW, AND FAIR TRIAL.

At the close of the evidence-reception stage of this trial, appellant stood in an excellent position for a verdict of acquittal. A witness to the bank robbery had positively identified appellant's brother, from photographs, as the perpetrator; his brother's van had been identified as the getaway vehicle; there was alibi evidence of appellant's presence in Utah at the time of the robbery; appellant's flight to Canada was explained by the outstanding draft-evasion charges against him; and, most importantly from the prosecutor's point of view, crucial, damaging, albeit prejudicial and irrelevant, evidence against appellant, the testimonies of Ruven Matias and Elvin Torres, implicating appellant in the transfer of guns to, and association with, the two guilty-pleading members of the robbery team, had either been excluded from the trial by the court (Matias) or was unavailable to the prosecution at the time of trial (Torres-T.32). So important did the prosecutor regard this evidence to his no-reasonable-doubt calculus, that he continued to argue about it after the judge's ruling (T.265-267), that he renewed his offer later in the same day (T.389),

and that, in conversation with trial counsel, admitted

> that he would not be disappointed if the Court were to grant the motion (for mistrial made after his summation), because he would then be able to mandamus this Court in the Second Circuit in order to compel this Court to allow Ruven Matias to testify at the retrial... he was sure the Circuit would rule against this Court and in favor of the government.
>
> (See affidavit of trial counsel submitted in support of post-trial motions at p.1).*

We submit that in light of these remarks by the prosecutor, in the context of this case as it lay before the jury at the close of the evidence, the prosecutor's outlandish summation, which drew the motion for the mistrial and the Court's corresponding order, was a calculated, no-holds-barred, desperate, nothing-to-lose tactic to ensure that appellant would be found guilty, or that the prosecutor would have his hoped for second shot at putting the Matias evidence before a jury.

No prosecutor concerned with avoiding a mistrial would engage in the prejudicial conduct displayed in

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*/ The prosecutor did not submit any opposing affidavit.

this case by the prosecutor in his final statements to the jury. The very thrust of his summation was a totally unjustifiable and impermissible attack on defense counsel; accusing him of "misrepresent[ing] the record," "misrepresent[ing] the facts" (T.447); of "trick[ing] Mr. Jackson into making that identification"(T.460-461), of "clutching" at "the straw of Mr. Jackson's identification, of Mr. Jackson being tricked into identifying Alberto Estremera"(T.462).* He persisted in the latter remarks even after the Court sustained defense counsel's objection and after the Court specifically ordered that "We have gone far enough on that" (T.461). He implied that defense counsel had committed perjury from the witness stand when counsel testified to a bank witness' out-of-court photo identification of appellant's brother**(T.457,462-463). He accused defense counsel of "impropriety," while he vouched

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*/ On cross-examination the prosecutor accused defense counsel of having knowingly "induced misidentification" (T. 386). The Court sustained the objection to this remark.

**/ Since counsel was representing the indigent appellant without fee, having been refused CJA appointment by the Court, counsel conducted his own photo spread interviews and was required to take the stand to testify to them. (See, Point VI, infra.)

for the integrity of the government, whose case he asked the jury to accept on that basis (T.460-461). He asked the jury to draw a negative inference against appellant because the defense had made an objection:

> you heard me on cross-examination ask Mr. Berman, by the way,did you show that photo of Alberto to Mr. Romero? I think then you heard Mr. Stern get up and object and say, your Honor, it is beyond the scope of direct examination.
>
> (T. 462-463)

He argued to the jury on the basis of evidence stricken from their consideration (T.469-70). He specifically flouted the Court's order to refrain from political or philosophical argument, and continued with the argument even after being instructed a second time to desist (T.475-76). He referred in the process to statements of belief made by a juror during voir dire, and accused appellant of disgracing that belief.

> Judge Duffy asked you all, in your voir dire, about your attitudes toward the draft. And I think one of the jurors, I think it was Mr. Crookshank, if I'm not mistaken, said that he believed in some form alternate service. Ladies and gentlemen, this is the form of alternate service that Mr. Estremera chose(indicating).
>
> (T. 476)

Counsel objected during the summation and the objections were sustained. Following the summation, the trial Court, agreeing that the fairness of the

trial had been hopelessly polluted, granted appellant's motion for a mistrial(T.479-480). Decisions of this Court would certainly sustain the trial Court's proper estimation of the extent of the that pollution. United States v. Gonzales, 488 F.2d 833(2d Cir. 1973); United States v. Drummond, 481 F.2d 62(2d Cir. 1973). However, the trial court ruled simultaneously and erroneously, that the case would have to be tried again (T. 479-484). In so doing, it played right into the hands of the prosecutor, and, in contravention of the "safeguard of the Fifth Amendment ... exercise(d) his authority to help the prosecution, at a trial in which its case is going badly, by affording it another more favorable opportunity to convict the accused." Gori v. United States, 367 U.S. 364, 369(1961).

The Supreme Court has over the years continually warned against the kind of prosecutorial manipulation exhibited here, and it has always threatened to apply double jeopardy proscriptions should the proper case be presented to it. In Gori, supra, it warned, as quoted above, while upholding the "manifest necessity" of the trial court's mistrial declaration where there was no deliberate prosecutorial misconduct. In United States v. Tateo, 377 U.S. 463(1964), while holding that a defendant's collateral request to have his guilty plea vacated waived any double jeopardy bar to his re-prosecution,

the Court said quite clearly,

> If there were any intimation in a case that prosecutorial or judicial impropriety justifying a mistrial resulted from a fear that the jury was likely to acquit the accused, different considerations would, of course obtain.
>
> 377 U.S. at 452 n.3

The Court said it again in United States v. Jorn, 400 U.S. 470, 485, n.12(1971), and once more in its latest case dealing with double jeopardy, Illinois v. Somerville, 410 U.S. 458, 464, 469(1973):

> While the declaration of a mistrial on the basis of a rule or a defective procedure that could lend itself to prosecutorial manipulation would involve an entirely different question ... such was not the situation... in the instant case (464) ... the trial judge's action was a rational determination, designed to implement a legitimate state policy, with no suggestion that the implementation of that policy in this manner could be manipulated so as to prejudice the defendant...(or) operated as a post jeopardy continuance to allow the prosecution an opportunity to strengthen its case. (469).

Only in one case has the Court actually applied these principles to bar a retrial. In Downum v. United States, 372 U.S. 734(1963), the prosecutor proceeded to the trial and the impaneling of a jury without the ability to go forward with his witnesses. The Court held that this kind of prosecutorial negligence, which resulted in a mistrial declaration, could not be permitted to

deprive a defendant of his Fifth Amendment right to proceed to a single verdict by the originally empaneled jury. Although, the Court recognized "At times the valued right of a defendant to have his trial completed by the particular tribunal summoned to sit in judgment on him may be subordinated to the public interest when there is an imperious (manifest) necessity to do so ... ," it warned that:

> Harrassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict are examples when jeopardy attaches.
>
> Downum, supra, 372 U.S. at 736(emphasis added)

The instant case is far worse than Downum. If, in Downum, retrial was barred though no evidence had been taken in the first trial, retrial should be barred here, where all the evidence was in. If, in Downum, retrial was barred even though the prosecutor's error in the first trial was merely negligent, retrial should be barred in the instant case, where there was a deliberate flouting of fair trial principles, of the law of the case and of the direction of the trial judge, and an intentional inducement of "a post jeopardy continuance to allow the prosecution an opportunity to strengthen its case." Somerville, supra, at 469.

Thus, with the Court's order simultaneously declaring a mistrial and the necessity for a second trial, the prosecutor, who had caused the abortion, gained his opportunity to re-offer the previously excluded evidence, or,failing that, to attempt to mandamus the trial Court to admit it; he gained complete discovery of appellant's defense, and he avoided the possibility of an acquittal. He lost nothing. Only the defense lost. It lost that possible acquittal; the prosecutor's summation took care of that. It lost the Fifth Amendment right to have the trial and its attendant anxieties, not only for appellant, but for his wife and three children, concluded once and for all. It lost the Fifth and Sixth Amendment rights to have this original jury reach a fair verdict. It faced a second trial at which the highly prejudicial evidence of association would be very possibly admitted against it. And, although instructed by his counsel not to regard this is a consideration, appellant himself, who had relied all along on the representation without fee of his trial counsel who had been refused appointment by the Court, faced the added burden of imposing on counsel the second trial.

In sum, appellant was faced with the Scylla and Charybdis choice of proceeding with the trial and thereby waiving his Fifth and Sixth Amendment rights to a fair trial unpolluted by a slanderous government summation, or

of taking the mistrial, on his own motion, and thereby waiving his Fifth Amendment right against double jeopardy. A defendant cannot be forced to choose among Constitutional rights, all of which he should have been afforded. Simmons v. United States, 390 U.S. 377(1968); United States v. Branker, 418 F.2d 378 (2d Cir.1969); United States v. Jackson,390 U.S. 570(1968). Any choice made under such circumstances is involuntary and unreasonable and does not constitute a waiver of those rights. Appellant's choice to withdraw the motion for mistrial and to proceed to the verdict cannot for those reasons be regarded as a voluntary waiver of any of the rights denied by the prosecutor's misconduct. As the Fifth Circuit said recently in the case of United States v. Alford, 17 Cr.L. 2426,28 (decided July 30, 1975),

> [The prosecutor] cannot force the defense counsel into the position of either themselves asking for the mistrial - which consent would foreclose their appealing the double jeopardy issue - or explicitly agreeing to go to trial ... and therefore waiving an appeal on the sufficiency of the indictment ... He cannot be permitted to insure that the resolution be immunized on appeal by turning the decision over to defendants at his own volition and forcing the defense to come forward and affirmatively accept it or reject it.
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> (emphasis added)

Although counsel in the instant case might have insisted on the mistrial motion and then appealed

the trial Court's order of a new trial, arguing as he did in the trial Court (T. 263-263a, and see appellant's post-trial motions and attached affidavit of counsel), and as he does now, that a mistrial motion induced by prosecutorial misconduct should not constitute a waiver of double jeopardy claims (authorities cited above). But this again was a choice that involved the immediate relinquishment of the Fifth Amendment right to have the single trial concluded against the prospective and highly speculative possibility that the position of no waiver would be sustained by this Court on appeal. Counsel could not advise his client that this position would be sustained, because, other than the precedent of Downum, supra, and the various dicta and footnotes referred to above*, no case had ever penalized prosecutorial misconduct to the extent of barring further prosecution of the defendant, and recent decisions of this Court had found double jeopardy waiver in the mere silent acquiesence of defense counsel to a judge's declaration of mistrial. United States v. Beckerman, 2d Cir., decided May 13, 1975, Docket No. 74-2478. Thus, the reality for appellant at the time the forced decision had to be made, was that he and his family would be forced to further agonizing delay and then to

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*/ United States v. Alford, supra, ultimately exonerated the prosecutor, but found no "manifest necessity" in the course taken by the Judge in declaring the mistrial as to one defendant simply because a second defendant was not ready for trial.

a second trial, at which the new, additional evidence against him would be damning. Under all these coercive circumstances, the forced decision which appellant made, to proceed to a probably-polluted verdict, was a decision which he would never have had to make if the prosecutor had not purposely engaged in the gross misconduct which occurred here and which was deliberately aimed at forcing appellant to make such a Hobson's choice. Thus, appellant's decision not to take the mistrial, which the Court erroneously had linked to a re-trial, was no waiver of his rights to a fair trial and to single jeopardy.

## POINT III

THE REFUSAL TO PERMIT APPELLANT TO APPEAR IN A LINE-UP WAS, UNDER THE PARTICULAR CIRCUMSTANCES OF THIS CASE, AN ABUSE OF DISCRETION AND A DENIAL OF APPELLANT'S CONSTITUTIONAL RIGHTS TO A FAIR TRIAL, TO CONFRONT THE EVIDENCE AGAINST HIM AND TO EQUAL PROTECTION OF THE LAW.

Soon after the robbery, the FBI, in appellant's absence, secured an identification of appellant by the witnesses Romero and Jackson through the use of a photo spread.

> There is no question that identification testimony is notably fallible, and the result of it can, and sometimes has been, 'the greatest single injustice that can arise out of our system of criminal law.'
>
> United States v. Evans, 484 F.2d 1178, at 1187 (2d Cir. 1973).

The particular dangers inherent in photographic identification are well known. Simmons v. United States, 390 U.S. 377, at 383-384(1967) [Harlan, J.] . And it is universally recognized that a corporeal line-up is a much more reliable and valid test of identification than a photo spread is.*

Although a defendant has no absolute right to a line-up and although the question of whether to permit a line-up is a matter of discretion for the trial court, we submit that, on the particular facts of the instant case, the Court abused its discretion in not granting appellant's request for a line-up.

Above and beyond the general reasons why line-ups are always more reliable than photo spreads,** the particular circumstances in the instant case made the use

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*/ Among the obvious reasons for this are: 1) the fact that photo spreads are limited to the photos which are available, while live participants in line-ups can be made to move around and strike various poses, to wear certain clothing, to shave, to alter their hairdos, to speak certain words, etc., 2) line-ups show relative heights and weights, while photo spreads, as in this case, are usuaully limited to head and shoulders, 3) line-ups are literally in living color, while photo spreads, as in this case, are usually black and white.

**/ See previous footnote.

of a line-up virtually imperative: 1) The crime had occurred almost 2½ years before the trial. 2) Appellant and Alberto bear a striking resemblance in photographs.* 3) None of the eyewitnesses had been shown a photo of Alberto at the time they were shown the photo spread.** 4) Appellant was tried alone, without any co-defendants at counsel table, thus rendering the in-court identification a virtually foregone conclusion. 5) No one would have been prejudiced by a line-up in the instant case. 6) The eyewitnesses in this case were presumably willing to view a line-up, since they voluntarily agreed to be interviewed by defense counsel and to view defense counsel's photos. 7) Counsel for neither side in this case had been present when the FBI had shown the photo spreads in 1973, and both attorneys were now available to view a line-up. See, United States v. Wade, 388 U.S. 218(1967). 8) At least one of the witnesses (Jackson) made an inconsistent identification (of Alberto) from photos.

The Court's only stated reason for refusing to permit a line-up was that a line-up "could work a tremendous detriment to the defendant." Obviously, if the witnesses identify a defendant in a line-up, the defendant is then in a less favorable position than before, but by the Court's

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*/ Compare Exh. C with Exh. G.

**/ Appellant's counsel did not show the Alberto photos to any of the eyewitnesses until March 14, 1975, after the line-up motion was denied.

reasoning, no line-ups could ever be held,because suspects might be identified. The absurdity of such reasoning, in denying the line-up request herein, cannot therefore be deemed an informed exercise of discretion. To the contrary, it was a blanket rule that made no sense, for it ignored the very important other side of the coin, i.e., the possibility that appellant might not have been identified in the line-up.

The refusal to permit the line-up in this case also violated appellant's Sixth Amendment right to confront the evidence against him. A photo spread such as the one conducted here ex parte by the FBI, is essentially an experiment or a test, and, as such, appellant had a right to have his lawyer conduct a test on the same question of identification, using the preferred technique (a line-up), and with counsel for both sides present as witnesses. See Wade, supra. It is just as if the FBI had, in some case, conducted a ballistic test, or an analysis of possible drugs, or had administered a polygraph test, or had conducted a medical or mental examination of the defendant. In all such cases, the defendant's right of confrontation would not be satisfied by his merely being allowed to cross-examine such tests; the defense would be constitutionally entitled to examine the subject matter and to conduct its own test, using the proper, recognized methods and procedures. The rule should be no different in this case, if the

confrontation clause is to have any practical meaning.*

Moreover, the refusal to allow the appellant to participate in a line-up must be deemed a denial of his Fifth Amendment right to equal protection, for appellant, who was indigent, and who was in jail for lack of funds for bail, could not participate in a line-up without the Court's permission. A defendant out on bail, on the other hand, is always free to participate in a line-up.** Thus, the denial of the line-up was a direct function of appellant's poverty and offended the equal protection clause. Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois , 351 U.S. 12(1956).

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*/ See generally, Davis v. Alaska, 415 U.S. 308,315(1974) [confrontation is paramount to secrecy of youthful offender conviction]; Dutton v. Evans, 400 U.S. 74(1970) [confrontation violated by use of hearsay statement of accomplice]; Bruton v. United States, 391 U.S. 123(1968) [proper instruction insufficient to cure confrontation problem]; Smith v. Illinois, 390 U.S. 129(1968) [required to reveal witness' true name]; Roviaro v. United States, 353 U.S. 53(1957) [disclosure of identity of informant]; Alford v. United States, 282 U.S. 687(1931) [required to reveal that witness was residing in prison]; United States v. Ruiz-Estrella, 481 F.2d 723 (2d Cir.1973) and United States v. Clark, 475 F.2d 240 (2d Cir. 1973) [defendant must be permitted to confront hijacker profile evidence].

**/ Of course, in either case, the witnesses must be willing to view the line-up. But in the instant case the three eyewitnesses were willing to view the defense photos and to be interviewed by appellant's lawyer, and there is thus every reason to assume that they would have also agreed to view a line-up.

Finally, when the line-up motion was made, the witness Bolla had not yet seen any photo spread which included appellant's photo. Thus, as to Bolla, the Court's denial of a line-up can not be jusitified by saying that he had already identified appellant from photos.

For all these reasons, on the facts of this particular case case, the judgment should be reversed. Since the in-court show-up situation at the trial which has already taken place renders the holding of a line-up now fairly useless, a new trial is inappropriate, and the only remedy now consistent with the denial of appellant's rights as decsribed in this point is the dismissal of the indictment.

## POINT IV

### THE JURY'S VIEW OF THE METAL DETECTORS AND OF APPELLANT IN THE CUSTODY OF THE MARSHALS, DEPRIVED APPELLANT OF THE PRESUMPTION OF INNOCENCE AND DENIED HIM A FAIR TRIAL.

Appellant's trial was conducted in an atmosphere which the Court described as one of "the utmost security" (T.4). Despite counsel's attempts to avoid it before it happened, the entire panel of prospective jurors was ushered into the courtroom through the same door as the public, while the public was being searched with metal detectors and while the marshals were taking down the names of all spectators (T.2).

Although this was a panel that had sat in previous

trials,where there were never such security precautions, and although even the prosecutor asked the Court to direct the marshals not to use the metal detectors when the jurors were present, the Court refused to do so. The Court also denied counsel's request that the Court say something during voir dire to eliminate any curiosity about the metal detectors.

All of these arguments were made before the panel ever arrived. The Court's only response was to order that the jurors use the Pearl Street elevators after the jury was selected (T.12).

Similarly, the Court refused to move the marshal, who was sitting directly behind appellant, only four feet away, within the rail which separated the front of the courtroom from the spectator section. This marshal was the only man within that rail who was not introduced to the jury. His role was obvious.

Finally, although counsel twice specifically asked the marshal not to march appellant out of the courtroom during a recess until after the jury had retired to the jury room, this request was ignored, and, in the prosecutor's words, appellant was "walked out of the courtroom with a marshal in front of him and one behind him" (T.18). In fact, appellant was paraded by those marshals right past the front of the jury box, and several of the jurors turned their heads and followed the progress of appellant and his jailors (T.21). Appellant's timely motion to discharge the

panel was denied.

> ... a defendant has a right to be tried in an atmosphere free of partiality created by the use of excessive guards... . One reason underlying this right is that guards seated around or next to a defendant during a jury trial are likely to create the impression in the minds of the jury that the defendant is dangerous or untrustworthy.
>
> Kennedy v. Cardwell, 487 F.2d 101, 108 (6th Cir. 1973), emphasis added.

> ... the presumption of innocence requires the garb of innocence, and ... every defendant is entitled to be brought before the court with the appearance, dignity, and self-respect of a free and innocent man.
>
> (Id. at 104)

There is no question that appellant had a right, consistent with the presumption of innocence, to be tried by a jury which did not know that he was in custody and which had not been given cause to believe that appellant and his friends and family were security risks or that there was some special security problem regarding his trial.

Of course, if appellant had been disruptive in the courtroom, he may have to be restrained, and his own action deemed to have been a waiver, Illinois v. Allen, 397 U.S. 337(1970). Or, if a Court specifically finds that there have been threats in the mail, or that a demonstration has been planned for the courtroom, or if spectators had previously been unruly during the trial, extra security measures, such as extra marshals or metal detectors, might

well be reasonable. United States v. Heck, 499 F.2d 778, 789(9th Cir. 1974). Or when jurors see a defendant in custody, the problem may be rendered harmless if the Court promptly voir dires the jurors to determine if the decision of any of them might be influenced by what they had seen. United States v. Torres, ___F.2d ____ (2d Cir., July 2, 1975), slip op. 4573, at 4581.

In the instant case, however, appellant had never been disruptive(Allen, supra), there had been no threats or demonstrations or outbursts by spectators (Heck, supra), and the Court refused to consider appellant's timely request to voir dire the jury on the question of the added metal detectors (Torres, supra).

Thus, appellant was deprived, at least in part, of the presumption of innocence for no good reason and the Court never took any corrective measure to at least attempt to avoid this prejudice to appellant or to lessen its impact. The judgment must be reversed and a new trial ordered.

## POINT V

### THE COURT - ORDERED PRE-TRIAL DISCOVERY OF THE DEFENSE PHOTOGRAPHS OF ALBERTO ESTREMERA WAS NOT AUTHORIZED UNDER RULE 16(c) AND IT IMPROPERLY SERVED TO INFORM THE PROSECUTION OF EXACTLY WHAT APPELLANT'S DEFENSE WAS GOING TO BE.

Rule 16(c) of the Federal Rules of Criminal Procedure provides that if the Court grants to the

defendant discovery of physical or scientific evidence in the possession of the government,

> .. it may, upon motion of the government, condition its order by requiring that the defendant permit the government [to have reciprocal discovery of like items] which the defendant intends to produce at trial... .
>
> (emphasis added)

By simply reading Rule 16(c), three points are immediately clear:

> 1. Rule 16(c) is not talking about voluntary disclosure by the government.
>
> 2. Rule 16(c) permits the defendant, if the Court decides to make discovery by the defense contingent upon reciprocal discovery by the government, to then exercise the option of not having any discovery and of keeping its evidence secret until trial.
>
> 3. Rule 16(c) does not authorize the court to order discovery of defense material unless the defendant intends to use it at trial.

In the instant case, the government voluntarily gave appellant the photo spreads; it was never ordered to do so by the Court. Thus, there never was a question here of a court ruling that one side be ordered to disclose that which the other side had been ordered to disclose. The government here did not object to the defense seeing the FBI photo spreads involving appellant, because appellant was no secret: he was the defendant. But the defense certainly objected to letting the government see the Alberto photos prior to trial, because that was a secret; the government

certainly did not know for sure that appellant was going to use an 'Alberto defense'. Thus, not only was the compelled disclosure of the Alberto photos unauthorized by the Rule, it was really unfair to appellant.

But even if the government had not consented to disclose its photos, and even if (which was not the case here) the Court had ordered disclosure of the government photos under Rule 16(b), the deadline for court-ordered reciprocal discovery under Rule 16(c) came at the point when the government turned over to appellant the copies of the government photos, for once that point was passed, it was too late for appellant to say, in effect, "you keep your photos and I'll keep mine." Under Rule 16(c), a defendant is entitled to know, before he accepts discovery from the government, whether such acceptance is going to give the government reciprocal discovery. But appellant was never given that option to make a reasoned choice: he accepted the government's offer of discovery at a time when no strings were attached to it, only to learn, later, that he was to be compelled to disclose the heart of his defense. Rule 16(c) simply does not authorize such unfairness.

The prosecutor, in his memorandum of law filed April 10, 1975, countered the above argument with no more than the following paragraph:

> The answer to that argument is found in United States v. Milano, 443 F.2d 1022 (10th Cir. 1971). The Court there held that '[t]here is nothing

> in the statute requiring the Court to impose the condition [of reciprocity] at the same time it grants defendant's discovery. It may condition its original 16(b) order at a later date. Defendant's objection to the timing of the 16(c) order is without merit.'
>
> (Memorandum, supra, at p.16)

At the time he received this memorandum , counsel believed that the above'quote' from 'Milano' was genuine. A recent review of Milano, supra, revealed that neither the above 'quote' nor anything closely approximating it appears in the Milano opinion. In any event, counsel certainly has not found any case in this circuit differing with our above 'simultaneous conditioning' interpretation, and the Court's ruling below must be deemed unfair and erroneous.

Moreover, the Court's granting discovery of the nine Alberto photos before counsel had decided whether he intended to use them runs counter to the plain meaning of the words of Rule 16(c), and this is certainly true with regard to the seven Alberto photos about which counsel unequivocally stated "I will never introduce [at trial]." Apart from the general prejudice to appellant in terms of the prosecution learning his defense prior to trial, the prosecutor used his knowledge of the seven unintroduced photos to effectively cross-examine both the photographer who took the photos for the defense (T. 335-336) and appellant's counsel (T. 368).

The Court's error, even if well-intentioned, in effectively revealing appellant's defense prior to trial, unquestionably cost appellant his right to a fair trial and he must be granted a new trial.

## POINT VI

THE COURT'S REFUSAL TO GRANT C.J.A. APPOINTMENT TO APPELLANT'S COUNSEL, WHO WAS UNIQUELY FAMILIAR WITH THE APPELLANT AND WITH THIS CASE, AND WHO WOULD FACE CONSIDERABLE EXPENSE FOR TRAVEL TO VERIFY THE UTAH ALIBI AND FOR AN INVESTIGATOR TO SHOW PHOTOS TO THE EYEWITNESSES, WAS AN ABUSE OF DISCRETION, AND DENIED APPELLANT THE EFFECTIVE ASSISTANTCE OF COUNSEL AND EQUAL PROTECTION OF THE LAW.

Appellant's counsel was uniquely familiar with the facts of this case: He had represented Alberto Estremera on this very case in 1973, while Alberto was a defendant in this case.* He had enough of a rapport with Monges and Washington that the two were willing to discuss the facts of the case with him (T.6). He had been appointed , under the Criminal Justice Act, to represent appellant on his Selective Service case in the Eastern District Of New York, and it was through that representation that counsel had been able to verify an exculpatory. explanation (the draft prosecution) for appellant's flight, and it was also from representing appellant in that related

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*/ Counsel is in possession of an affidavit, signed by Alberto Estremera on March 28, 1975, in which Alberto approves of counsel's representing his brother after Alberto's case had been dismissed.

case that counsel learned of the documentary proof (in the Selective Service file) of the Utah alibi.* Counsel had appellant's complete confidence; appellant had contacted him and sought his representation. Counsel had repeatedly made it clear to the Court that even if he were not appointed, he would take the case pro bono because both counsel and appellant believed that any substitution of other counsel could only be to appellant's detriment. There was certainly no dispute over the fact that appellant was indigent.

Assuming that the Court's refusal to appoint appellant's counsel pursuant to the Criminal Justice Act was not in any way influenced by the Court and counsel's mutual dislike, or by the Court's stated disappointment that some lawyers earn more than Federal judges, the only reason which the Court ever gave for declining to appoint appellant's counsel pursuant to the Act was the Court's rigid, personal rule of not appointing anybody "except on a rotating basis." Again, even assuming that the Court believed what it said,** the refusal herein was an

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*/ Counsel also represents appellant on a case in the United States District Court for the Northern District of California (Cr. No. 74-169) which played a role in the taint hearing in this case and in which Matias was appellant's co-defendant.

**/ And we cannot help but note that on October 1,1975, in this very case, the same Court appointed counsel under the Act for the co-defendant Cumberbatch not "on a rotating basis," but rather because that attorney had previously represented Cumberbatch in other, state-court cases, essentially the same reason for making an exception as in the case of appellant's counsel.

abuse of discretion, given counsel's unique familiarity with the case and with appellant.

To put it simply, the Court's self-avowed adherence to a rigid rule cannot be termed a case-by-case exercise of discretion. The empyment of a "fixed and mechanical approach... rather than a careful appraisal of the variable components relevant[to the question]" is never an informed exercise of discretion United States v. Schwarz, 500 F.2d 1350, 1352 (2d Cir. 1974).

And there is no question that the Court had the power to appoint appellant's counsel pursuant to the Act. The Southern District Plan under the Act provides that:

> If at any stage of the proceedings a District Judge ... shall find that a person for whom counsel has not previously been appointed under this Plan is financially unable to pay counsel whom he has retained, the District Judge ... may appoint the same counsel or substitute counsel ...

(Plan, supra, §IV-C, emphasis added)

Assuming then, that the Court's ruling was wrong, there remains the question of whether this error affected appellant's rights, and not merely his counsel's pocket. On this point this Court well knows that an adequate defense, even with the most capable counsel, requires funds for investigators, fee transcripts and for travel.* In the instant case, there was a documented alibi, straight out

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*/ See generally, United States v. Mitchell, 73 Cr. 4[illegible].D.N.Y.).

of a government file, which placed appellant in Clearfield, Utah, on the very day of the robbery here in New York (T. 326; Exh. K-3), Negron testified that appellant had friends in Clearfield, Utah, in 1973 (T.228), and these friends might have been able to give direct testimony that appellant was with them in Utah at the time of the robbery, thus rendering the alibi defense more believable to the jury . But, without the authorization that, under a CJA appointment, he would be reimbursed for travel expenses, counsel was not able to fly to Utah to seek out such alibi witnesses.*

Also, counsel was without funds to travel to Canada to investigate the facts of appellant's stay there and to explore the details of the deportation/extradition issues.*

Moreover, counsel was without authorization to employ an investigator, and thus had to himself go to the various eyewitnesses and show them the photos. This enabled the prosecutor, in his summation, to attack counsel's

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*/ The Act, of course, authorizes that counsel appointed pursuant to the Act "shall be reimbursed for expenses reasonably incurred." 18 U.S.C. §3006A(d)(1).

**/ Counsel is in possession of letters he wrote and phone calls he made to appellant's Canadian attorney in an effort to explore these issues and to obtain transcripts of the Canadian proceedings, but the Canadian lawyer never cooperated, and appellant certainly cannot be held to blame for that.

integrity in terms of the manner in which he had exhibited the photos, and the Court found that the effect of this improper attack had spilled over onto appellant (T.479). And the lack of funds for an investigator meant that counsel was the only witness to the showing of the photos to Bolla. Thus, when Bolla's recollection of which photo he had identified differed from that of counsel, counsel was the only available witness to rebut Bolla and counsel reluctantly had to take the stand, putting his own credibility in issue, with the consequent undesirable spill-over effect upon appellant.

Appellant was thus, because of his indigency, deprived of the effective assistance of counsel and denied equal protection of the law. Griffin v. Illinois, 351 U.S. 12(1956); 18 U.S.C. § 3006 A et seq. The judgment must be reversed and a new trial ordered,* with appellant's counsel to be appointed pursuant to the Criminal Justice Act.

## POINT VII

THE CCURT, IN IGNORING THE DIFFERENCES BETWEEN APPELLANT AND HIS CO-DEFENDANT, THE RECOMMENDATIONS IN THE PRE-SENTENCE REPORT AND THE INDIVIDUAL POSITIVE AND MITIGATING FACTORS IN APPELLANT'S HISTORY

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*/ If this Court is not persuaded that, upon reversal, the indictment herein should be dismissed (POINTS I,II, and III, supra), and is inclined, instead, to order a new trial (POINTS IV, V, and VI), such a new trial might well not be costly to the public, for it might well be consolidated with the upcoming trial of Cumberbatch in this case.

AND CHARACTER, AND IN CONSIDERING ONLY THE FACT OF THE BANK ROBBERY IN IMPOSING VIRTUALLY IDENTICAL SENTENCES ON ALL THREE DEFENDANTS, EMPLOYED A FIXED AND MECHANICAL APPROACH TO SENTENCING, REQUIRING THIS COURT TO INVALIDATE APPELLANT'S SENTENCE.

The Court gave all three convicted defendants in this case the identical eighteen (18) year sentence.* The Court made no distinction between any of the defendants as individuals. When it sentenced Monges and Washington, it noted that Monges had been arrested in possession of a bomb (C.9) and that Washington had been in possession of anti-tank and anti-personnel weapons(C.8). It also commented on Monges' and Washington's serious prior records (C.9) and their in-court contempt for the judicial system (C.10). One of them had pistol-whipped a bank employee.

Appellant, on the other hand, had a prior conviction only for the misdemeanor of mischief.

He had a wife and three young children. The presentence report stated that he had "adjusted well in the community," and it recommended a sentence of between 4½ and 11¼ years and the possibility of sentence under

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*/ Appellant was technically sentenced to 17 years imprisonment, after the Court verified that he had already served one year in Canada awaiting extradition (S.26).

§ 4208(a)(2).

Counsel brought numerous mitigating and favorable personal factors to the Court's attention, and the truth of those assertions was never disputed. Appellant had run breakfast programs in Brooklyn and on the West Coast and had developed and led drug-therapy programs. Thousands of residents of Ocean Hill -Brownsville and numerous prominent citizens had sent a petition to the Court seeking appellant's return to the community. Counsel also distinguished the instant case from those of more serious bank robberies or more dangerous bank robbers (second-felony offenders, hostage-takers, multiple bank robberies, robbers who discharge guns or injure victims).

The Court ignored all of this. In its remarks on imposing sentence, it virtually avoids mentioning anything about appellant, and states that all that it is concerned with is "one particular incident, and that incident was the bank robbery."

This Court, after a careful review of the record herein, must conclude that:

> ...the court employed a fixed and mechanical approach in imposing sentence rather than a careful appraisal of the variable components relevant to the sentence upon an individual basis. Williams v. Oklahoma, 358 U.S. 576, 585, 79 S.Ct. 421, 3 L.Ed.2d 516(1959); Williams v. New York, 337 U.S. 241, 247-250, 69 S.Ct. 1529, 93 L.Ed. 1760(1949). This situation requires us to invalidate the sentence. United States v. Brown, 470 F.2d 285, 288-289

(2d Cir. 1972); United States v. Baker, 487 F.2d 360, 362-364 (2d Cir. 1974) (Lumbard, J., dissenting); Woolsey v. United States, 478 F.2d 139, 143-145(8th Cir 1973).

United States v. Schwarz, 500 F.2d 1350, 1352 (2d Cir. 1974)

The Court's statements in the instant case, considered as a whole, are quite susceptible of the interpretation that appellant was being sentenced as a member of a specific class -- a class consisting of all bank robbers. Such a method of imposing sentence is clearly improper and is clearly reviewable by this Court, See, Schwarz, supra, and cases cited therein.

Under these circumstances, if this Court does not dismiss the indictment or grant a new trial, it should at least vacate the sentence herein and direct that the case be reassigned for sentence by another judge "both for the judge's sake and the appearance of justice." Schwarz, supra, 500 F.2d at 1352.

## CONCLUSION

FOR THE ABOVE REASONS, THE JUDGMENT SHOULD BE REVERSED AND THE INDICTMENT DISMISSED. IN THE ALTERNATIVE, A NEW TRIAL SHOULD BE ORDERED. IN THE ALTERNATIVE, THE MATTER SHOULD BE REMANDED FOR RESENTENCE BEFORE ANOTHER JUDGE.

Respectfully submitted,

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